



Office of the Chairman
Board of Veterans' Appeals
Washington, D.C. 20420

Date: November 25, 2020

**MEMORANDUM
NO. 01-20-13**

**SUBJ: PERFORMANCE REVIEW AND RECERTIFICATION OF
MEMBERS OF THE BOARD OF VETERANS' APPEALS**

1. REFERENCES

- a. 38 U.S.C. § 7101A(f) (2020).
- b. Performance Plan for Members of the Board of Veterans' Appeals (Attachment A).
- c. Performance Review Procedures for Members of the Board of Veterans' Appeals (Attachment B).
- d. Chairman Memorandum No. 01-19-10, "Performance Review and Recertification of Members of the Board of Veterans' Appeals" (November 15, 2019).

2. BACKGROUND

Pursuant to 38 U.S.C. § 7101A(f), the Chairman of the Board of Veterans' Appeals (Board) has established the attached criteria to evaluate the job performance of each member of the Board. Attachment A. Pursuant to 38 U.S.C. § 7101A and additional procedures prescribed in the Secretary of Veterans Affairs Memorandum, dated November 23, 2020, the attached Performance Review Procedures for Members of the Board have been established. Attachment B.

3. PURPOSE

This memorandum describes the administrative process by which review of Board members' performance during Fiscal Year (FY) 2020 will be conducted for recertification.

4. PERFORMANCE REVIEW PANEL

- a. **Composition.** In accordance with 38 U.S.C. § 7101A(c)(1)(A), the Chairman hereby establishes a performance review panel consisting of the Chairman and the following Board members:

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Group 1: Anthony Mainelli, Jonathan Hager

Group 2: Anthony Scire, Andrew Mackenzie

Group 3: Simone Krembs, Marti Hyland

Alternates: Thomas O'Shay, Dana Benjamin Johnson

Each group of panel members will review the performance of approximately one-third of the members of the Board. No panel member will review his or her own performance, or the performance of his or her supervisor.

The performance of any conditionally recertified member will be reviewed by the panel members who initially granted the conditional recertification. 38 U.S.C. § 7101A(c)(4).

- b. **Scope of Review.** The panel will make its determination based on a member's performance evaluation, and such other information as the panel deems necessary. Each member's supervisor must complete an evaluation, which then must be approved by the next higher supervisor. For appraisals completed by a Deputy Vice Chairman, the Vice Chairman will serve as the higher-level approving official.

5. NOTIFICATION OF RESULTS

- a. If the panel makes a preliminary determination that a Board member's performance does not meet the performance standards of the position, the panel shall notify the Board member in writing of the specific deficiencies found and provide the Board member with a reasonable opportunity to respond before making its final determination. A Board member who is notified by the panel that a preliminary determination of a performance deficiency has been made, or who was previously conditionally recertified, may take up to three working days to respond in writing to the panel. The panel will consider any response received along with any other evidence obtained in reaching its final determination.
- b. After all final written decisions are submitted to the Chairman by the panel, she will notify each Board member of the results of the review and her tentative recommendations, if any.
- c. In a case in which panel members determine that a Board member who was previously conditionally recertified has again failed to meet the performance standards, once the panel submits their final written decision to the Chairman, the Board member has no opportunity to submit an additional response to the Chairman. The Chairman has no authority to exercise discretion in such cases but must recommend to the Secretary that the member be noncertified. 38 U.S.C. § 7101A(c)(4).

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- d. In all other cases where the Chairman has made a preliminary determination that she will recommend noncertification, a period of three working days will be allowed in which the Board member may respond orally, in writing, or both. The Chairman will consider any response received in reaching her final recommendation. Any recommendation for noncertification will be forwarded to the Secretary.

6. FAIR AND EXPEDITIOUS PROCESS OF PERFORMANCE EVALUATIONS

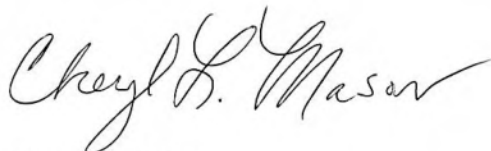
- a. **Submission of Supporting Documentation.** Although a Board member is free to review his or her file and submit supporting documentation at any stage of the evaluation process, the submission of additional documentation that has not been requested by the panel, or without notice of a preliminary finding of deficiency, is unnecessary. In the interest of providing everyone with fair and expeditious performance reviews, a Board member should consider submitting additional documentation *only* when a panel group requests it or in the event they are notified that the panel has made a preliminary determination that the Board member does not meet a performance standard or standards.
- b. **Review of Performance Review File.** A Board member who wishes to review his or her file may do so by appointment in the Office of the Chief Counsel. Any submission by a Board member for inclusion in his or her file should be hand carried to the Acting Chief Counsel.

7. QUESTIONS

Questions about the performance standards or review procedures should be directed to the Vice Chairman of the Board of Veterans' Appeals.

8. RESCISSIONS

- a. Chairman Memorandum No. 01-19-10, "Performance Review for Recertification of Members of the Board of Veterans' Appeals" dated November 15, 2019, is hereby rescinded.
- b. This memorandum is effective until expressly rescinded, modified, or superseded.



Cheryl L. Mason
Chairman

Attachments (2)

Attachment A

Performance Plan for Members of the Board of Veterans' Appeals

A. The criteria for the evaluation of job performance of a member of the Board (a.k.a., Veterans Law Judge), which have been established pursuant to 38 USC § 7101A(f) and Title 5, are as set forth below. Successful performance or greater is required in each of the criteria.

1. Legal Writing and Analysis

a. Prepares decisions and other legal documents and analyses

The Board member's decisions and other work products reflect and demonstrate the correct identification, consideration, and analysis of proper issues, arguments, procedural events and relevant evidence. The findings of fact are correct and responsive to the issues. The conclusions of law are supported by cited, current legal authority, including judicial precedent, and are dispositive of all legal issues presented. The decisions are appropriate, thoroughly and clearly explained, and are consistent with the Department's legal responsibilities. Judgmental and substantive errors, if any, contained in decisions and other work products are minimal and have no significant impact on the disposition of issues.

b. Uses correct format in preparation of all legal documents

Legal documents, including decisions, motions, and orders, are prepared in the proper format and contain correct spelling, grammar, usage, and punctuation. Grammatical, typographical, and format errors in final work products are minimal.

2. Timeliness of Decisions and Other Work Assignments

Work products are almost always prepared promptly and submitted in a timely manner, taking into consideration factors including the average processing time of all Board members for handling similar types of cases; the complexity of the cases or assignments handled; the amount of time the Board member is assigned to other duties; the totality of the Board member's workload; and any periods the Board member is on approved leave or absent for other good cause shown. Delays in the preparation and submission of work products that are beyond the control of the Board member or are related to his/her supervisory responsibilities will be excluded.

3. Productivity of Decisions and Other Work Assignments

The Board member produces a sufficient share of the Board's decisions and other assigned work products, considering factors including the complexity of the cases or assignments handled, the amount of time that the Board member is assigned to other duties, the totality of the Board member's workload, and any periods that the Board member is on approved leave or is absent for other good cause shown. The Board member also develops and executes plans relative to productivity and quality, leveraging human and financial resources to maximize efficiency and

produce high quality results. The Board member's productivity provides sufficient support for the achievement of the Board's performance and strategic goals.

4. Case Management

Work assigned and received from superiors, colleagues, and subordinates is reviewed and completed in a prompt and timely manner. The Board member is responsible for managing the flow of cases assigned to persons under his or her supervisory chain to monitor issues of timeliness and complexity, and to balance, to the extent possible, fairness in case assignment and movement. The Board member monitors the status of cases and other work assigned in order to anticipate and resolve procedural problems to minimize delay. The Board member provides oversight of all work products and clearly communicates constructive comments for improvement, as warranted, to staff counsel and others under their supervision to ensure that work is of the highest quality and is completed in a timely manner. The Board member avoids unnecessary development of the record or other action which delays the adjudication of an appeal or other work assignment.

5. Conduct of Hearings

Hearings are conducted effectively, efficiently, and in accordance with the applicable law and regulations, including the Board's Rules of Practice. The Board member conducts hearings in a manner that ensures procedural fairness and is designed to effectively develop a complete, clear, and concise record of the hearing, keeping redundant, irrelevant, and immaterial testimony and arguments to a minimum. The Board member assists the parties in bringing out all evidence necessary for a complete and fair resolution of the issues presented, clarifying any confusing or ambiguous testimony and/or eliciting information necessary to develop all the relevant facts. The Board member interacts with appellants, witnesses, and representatives professionally, tactfully, and in an impartial manner, without bias or actions giving the appearance of impropriety. The Board member demonstrates behavior consistent with VA's Core Values of Integrity, Commitment, Advocacy, Respect and Excellence as defined by I CARE, and exhibits leadership and a judicial demeanor. Any deficiencies are minor and do not significantly impinge on the fairness or quality of the hearing.

6. Organizational Cooperation and Support

The Board member's relationships with members of the public, colleagues, co-workers, supervisors, and others within the organization are consistently professional, courteous, and cooperative in nature and, overall, contribute to the effective operation of the Board and to the integrity of the VA adjudication process. The Board member demonstrates behavior consistent with VA's Core Values as defined by I CARE and focused on VA's Characteristics defined as Trustworthy, Accessible, Quality, Innovative, Agile and Integrated, while maintaining the highest ethical standards of public service. The Board member develops priorities and aligns strategies, objectives, and goals with the Board's mission, taking into account key influences on organizational performance. The Board member is an active participant in Board leadership, successfully leading organizational improvements, effectively communicating the Board's and Department's mission, core values, and strategic goals to employees. The Board member

provides sound advice to employees to assist them to function as effective team members and help advance the overall mission and objectives of the Board, and promotes employee engagement, including by examining and eliminating systemic barriers to an inclusive organization. Performance demonstrates the ability to proactively adjust to change or work pressure in a pleasant manner, handle differences of opinion in a businesslike fashion, and follow established office administrative policies and procedures conscientiously. The Board member exercises sound judgment to make effective and timely decisions. The Board member willingly participates in new and varied assignments, recommending process enhancements and improvements as necessary. Any deficiencies in these areas are limited or minor and have no significant adverse impact on either organizational or individual productivity or efficiency.

7. Customer Satisfaction

The Board member is continuously focused on employee engagement and outstanding customer service, in line with VA's ICARE Core Values. The Board member communicates to staff the importance of customer service as a critical component of the Board's mission; said component is applicable to both internal and external stakeholders. The Board member identifies and uses Departmental and governmental policies and economic, political, and social trends to recommend processes/changes to improve organizational performance. The Board member builds strong alliances with both internal staff and external customers to achieve mutually satisfying and legally accurate solutions to current issues. The Board member proactively shares ideas and manages risks for revised work processes. Any deficiencies in these areas are limited or minor and have no significant adverse impact on either organizational or individual productivity or efficiency.

Attachment B

Performance Review Procedures for Members of the Board of Veterans' Appeals

1. Introduction

By statute, the Chairman "is directly responsible to the Secretary" as the Board is charged with making all final decisions on questions of law and fact necessary to a decision by the Secretary under laws that affects the provision of VA benefits to Veterans, their dependents, or their survivors. *See* 38 U.S.C. §§ 511(a), 7101(a), and 7104(a). Title 38, United States Code, Section 7101A establishes basic parameters for the appointment, pay, performance standards, and removal procedures pertaining to all members of the Board of Veterans' Appeals (the Board) other than the Chairman. Except for the Vice Chairman and Deputy Vice Chairmen, the Board Members are not members of the SES. These non-SES Board members occupy a unique status as Board Members/Veterans Law Judges (VLJs). Pursuant to 38 USC § 7101A(f), "[t]he Chairman, subject to the approval of the Secretary, shall establish standards for the performance of the job of a member of the Board . . . Those standards shall establish objective and fair criteria for evaluation of the job performance of a member of the Board." The Chairman will establish a Performance Review Panel to review the performance of each member of the Board to determine whether each member's job performance meets the performance standards for that position. Because the standards and performance review procedures governing members of the SES are governed by separate statutes, regulations, and directives, the performance standards and performance review panels described in this memorandum do not apply to the Chairman or Board members who are members of the SES. 38 U.S.C. § 7101A(c)(1)(A).

2. Statutory and Regulatory Overview

While the Chairman is a Presidentially-appointed and Senate-confirmed position, Title 38, United States Code, Section 7101A mandates the Vice Chairman and all other Members of the Board "shall be appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman." This unique requirement for Presidential approval has been in place since the Board's inception in 1933, and Congress has repeatedly included this requirement in subsequent legislation related to the appointment of Board members. The passage of the Veterans' Judicial Review Act (VJRA) in 1988 established the U.S. Court of Veterans Appeals (the Court). However, shortly after the Court was created Congress became increasingly focused on VA's adjudication system, especially the role of the Board. Therefore, in March 1994, the Secretary chartered a "Select Panel on Productivity Improvement at the Board of Veterans' Appeals." Chaired by Mr. Guy McMichael, Chairman of the Board of Contract Appeals, the Select Panel included the Under Secretary for Benefits, VA's Office of General Counsel, the Board, officials from the Social Security Administration, and representatives from the leading Veterans' service organizations (VSOs). The Select Panel was specifically charged with one overarching purpose: "Conduct a systematic review of the Board of Veterans' Appeals and its relationship with other Departmental elements, and make recommendations regarding the mission, structure and operations of the Board that will result in more timely processing of claimants' appeals."

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Adopting many of the findings and recommendations of the Secretary's Select Panel, Congress passed two pieces of legislation in 1994 that fundamentally changed the Board's structure and operations, particularly with respect to the selection, approval, appointment, evaluation, and removal of Board Members. The provisions of both bills¹, now codified in 38 U.S.C §7101, *et seq.*, had a significant impact on Board operations, particularly with respect to the quality and timeliness of its decision-making. The statutory provisions permitted Board decisions to be issued by a single judge versus a panel, eliminated term limits for Board members, and removed previous restrictions on how many judges could be appointed to the Board. The provisions also provided unique career incentives, stability, appointment procedures, and evaluation criteria for Board members. While the law restored the practice of pay equity between Board members and federal administrative law judges (ALJs), Congress expressly directed performance standards and a certification process for Board members that are separate and distinct from those pertaining to ALJs. Congress also retained the longstanding practice that Secretarial appointments of Board members must be approved by the President. In 1998, Congress made two slight amendments: (1) requiring all Board members to be attorneys who must maintain good standing with a State Bar, and (2) granting certain removed judges the right to return to their previously-held attorney status at the Board.² VA later published 38 C.F.R. 20.100, *et seq.*, which, among other things renamed, all non-SES Board members as VLJs.

Pursuant to 38 U.S.C § 7101A(f), the Chairman of the Board of Veterans' Appeals, subject to the approval of the Secretary of Veterans Affairs, is required to establish "fair and objective criteria for evaluation of the job performance of a member of the Board." The Secretary is further charged with the prescription of procedures for the administration of these amendments, including deadlines and time schedules for different actions under 38 U.S.C. § 7101A(g). Again, Board members who are also members of the SES are governed by separate performance standards and performance review procedures.

3. Performance Review Panels

A. Composition

Each Panel will be composed of the Chairman and two other members of the Board, other than the Vice Chairman. "The Chairman shall periodically rotate membership on the panel so as to ensure that each member of the Board (other than the Vice Chairman) serves as a member of the panel for and within a reasonable period." *Id.* If the position of Chairman is vacant, then the senior member of the Board performing the duties of the Chairman will serve on each performance review panel. This may be the Vice Chairman, so long as the Vice Chairman is performing the duties of the Chairman because the Chairman position is vacant.

B. Frequency of Review

Not less than one year after performance standards are initially established and not less often than once every 3 years thereafter, the performance review panel shall determine

¹ Pub. L. 103-271, 108 Stat. 740 (Jul. 1, 1994); Pub. L. 103-446, 108 Stat. 4655 (Nov. 2, 1994).

² Pub. L. 105-368, 108 Stat. 446 (Nov. 11, 1998).

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whether each member's (other than SES members) job performance meets the established performance standards. The Panel's determination shall be in writing. 38 U.S.C. § 7101A(c)(1)(B).

C. Chairman's Options

1. If the Panel determines that the performance standards were met, the Chairman must "recertify the member's appointment as a member of the Board." 38 U.S.C. § 7101A(c)(2).
2. If the Panel determines that all the performance standards were not met, the Chairman, "based upon the individual circumstances," must either grant the member a conditional recertification or recommend to the Secretary that the member be noncertified. 38 U.S.C. § 7101A(c)(3).
3. If a conditional recertification is granted, "the performance review panel shall review the member's job performance record and make a further determination . . . concerning that member not later than one year after the date of the conditional recertification." If the Panel's determination at that time is that the performance standards were not met, the Chairman must recommend to the Secretary that the member be noncertified. 38 U.S.C. § 7101A(c)(4).

D. Secretary's Options

If the Chairman recommends noncertification, the Secretary, after considering the Chairman's recommendation, may either grant conditional recertification or determine that the member should be noncertified. 38 U.S.C. § 7101A(c)(5).

4. Specific Procedures, Deadlines, and Time Schedules for Performance Reviews

A. Performance Standards for Veterans Law Judges (VLJs)

1. The performance standards for Board member VLJs are set out in Attachment A. The standards are composed of seven criteria which encompass the significant duties and responsibilities of Board members. In brief, these criteria include legal writing and analysis, timeliness of decisions and other work assignments, productivity of decisions and other work assignments, case management, conduct of hearings, organizational cooperation and support, and customer service. These criteria are intended to advance the statutory mission and objectives of the Board, while providing for both accountability and decision-making independence of our Board members. A Board member must achieve a successful level of performance in each of the generally applicable criteria in order to meet the performance standards of the position.
2. The performance criteria are drawn, in part, from the performance plan for Board staff counsel, and the elements and standards of other federal

administrative adjudicators, including the following: Administrative Judge and Chief Administrative Judge, MSPB; Board Member, Departmental Appeals Board, HHS; and Administrative Judge, SBA. It is noted that Administrative Law Judges (ALJs) and many other federal adjudicator positions do not have performance standards.

3. In addition, the elements and standards set forth in the Senate Report (Report 103-385, at 19, 20) and the House Report (Report 103-668, at 21-22) were relied upon in establishing the Performance Plan for Members of the Board of Veterans' Appeals. As regards the Senate Report, productivity has been established as a "key element" of the Performance Plan. The need to avoid unwarranted delays in the adjudication process, which appears to relate to the recommendation that productivity standards incorporate "the total number of decisions the member has remanded or that otherwise remain unresolved," is addressed under the elements relating to timeliness and case management. Clearly, the total number of decisions remanded does not demonstrate whether such remands were warranted because the record is not ready for appellate review or because referral to the agency of original jurisdiction is necessary and proper. Similarly, while the decisions of the U.S. Court of Appeals for Veterans Claims (Court) are a factor to be considered in performance evaluation, the number of remands and/or reversals does not necessarily correlate with productivity or even with performance. It should be remembered that decisions of the Court are subject to reversal/remand by superior federal courts; that the Board decision may have been in compliance with the law or the interpretation of the law that was in effect when the decision was made; and that remands by the Court may result from joint motions by the parties, which may not have any bearing on the quality of the Board decision at issue or legitimate differences in judgment. While decisions of the Court must be considered, as discussed under B2, below, affirmances or other favorable comment by the Court should also be taken into consideration in order to achieve a balanced perspective on an individual Board member's performance. The number of Notices of Appeal filed with the Court does not appear to have any clear relation to productivity in particular or performance in general.

4. As regards the House Report, most of the considerations contained in the ABA guidelines for ALJs have been adapted, and, as appropriate, have been incorporated in the Board member Performance Plan, a copy of which is attached. It is observed that the ABA guidelines are not, strictly speaking, "performance standards."

B. *Performance Review Panel Procedures*

1. The Panel will utilize the standards established by the Chairman and approved by the Secretary in order to determine whether each Board member's performance is at an acceptable level.

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2. The Panel may consider all relevant sources of information as to the performance of each Board member, providing that its approach is fair and consistent for all Board members reviewed. Sources of information may include, but are not limited to, the following:

- a. Decisions and orders of the U.S. Court of Appeals for Veterans Claims and other federal courts which review a decision of the Board member.
- b. Referrals of the Board member's work product from the Board's quality review section and other sources.
- c. Referrals by the Board member of examples of his/her work product.
- d. Statistical information and other data prepared by the Board, including data on timeliness and productivity.
- e. Information regarding the developmental activities of the Board member, any awards or other recognition received by the Board member, accomplishments in special projects, other work assignments, participation on task forces, and reputation in the field.
- f. Written comments on the Board member's performance from supervisory personnel, appellants and their representatives, and other interested parties.

3. The Board member may submit a statement of accomplishments and other documentation giving evidence of his or her performance and the contributions made to advance the Board's goals.

4. A Board member will be afforded the opportunity to review and respond in writing to all documents obtained by the Panel in regard to its evaluation of that Board member's performance.

5. Factors such as rates of allowance, denial or remand of appeals assigned to the subject Board member shall not be considered in the performance review. However, the legal and factual correctness of the disposition of an individual case may be considered.

6. If the Panel makes a preliminary determination that the Board member's performance does not meet the performance standards of the position, the Panel shall notify the Board member in writing of the specific deficiencies found and provide the Board member with a reasonable opportunity to respond in writing before making its final determination.

7. Panel determinations of whether performance standards were met shall be made by majority vote.

C. Factors Guiding the Chairman's Determination to Grant Conditional Recertification or Recommend Noncertification

1. Conditional recertification is based on the premise that a Board member's performance deficiencies are capable of correction or result from temporary or situational problems. Therefore, each instance in which a Board member has been determined by the Panel to have failed to meet the established performance standards must be carefully evaluated on a case-by-case basis. It is understood that, generally, a Board member has considerable experience in the area of Veterans law and has demonstrated his or her ability in order to merit appointment to the position. Therefore, conditional recertification generally will be granted for an initial failure to meet one or more of the performance criteria. Even in the case of an initial failure, the Chairman may recommend noncertification where serious performance deficiencies are present.

2. Noncertification should be recommended in cases in which the Board member's performance is grossly deficient, and/or performance is not likely to improve. Noncertification also should be recommended where the Board member's performance is now deficient and in which, in the past three years, the Board member improved to an acceptable level following a grant of conditional recertification. In such a case, noncertification will be recommended whether or not the current performance deficiency or deficiencies involve the same performance criteria that resulted in the earlier conditional recertification.

3. Other Panel members may provide the Chairman with their recommendations as to whether he or she should grant conditional recertification or recommend noncertification to the Secretary. The Chairman may consider the recommendations, but is not bound by them.

4. If the Panel determines at the end of the conditional recertification period that the Board member's performance did not meet the performance criteria, the Chairman must recommend to the Secretary that the member be noncertified. § 7101A(c)(4). However, the statute does not restrict the Secretary from again granting conditional recertification under these circumstances. § 7101A(c)(5).

D. Noncertification Procedures

1. Whenever the Chairman is going to recommend to the Secretary that a VLJ be "noncertified" for reasons related to performance, the VLJ shall have the right to respond to that recommendation and to submit matters for consideration by the Secretary. Upon written notice that the Chairman recommends noncertification, a Board member shall have seven (7) business days to submit a response or other written matters for consideration by the Secretary prior to the Secretary rendering his or her final decision on the matter. The Secretary has the discretion to grant

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the member “conditional” recertification and may direct any reasonable conditions or limitations upon that recertification.

2. If the Secretary determines the Board member should be “noncertified,” then that member’s appointment to the Board shall be terminated and will be removed from holding status as a Board member. If the removed member served in an attorney position in the civil service before being appointed as a Board member, the removed member may request appointment to an attorney position at the Board and the Secretary shall grant that request so long as the Secretary determines the removed member would be qualified to hold the attorney position. In such cases, the removed member will have five (5) business days to request appointment to an attorney position at the Board and the effective date of the removal will be tolled during that five-day period. If the removed member seeking the attorney appointment served in an attorney position at the Board immediately prior to appointment as a Board member, then the removed member shall be appointed in the grade and step held immediately before appointment as a Board member. The Secretary’s decisions are final.